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No. 97-605

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent's brief in opposition highlights the significance of the court of appeals' departure from this Court's precedent. Under the view of the Commerce Clause adopted by the court of appeals and championed by Respondent, a local producer will no longer have the "certainty that . . . no home embargoes will withhold his exports." State and local governments will be allowed to apply the pinch to interstate commerce, so long as the part that feels the squeeze is only "personal consumer finances." The reach of the dormant Commerce Clause will no longer equal that of the affirmative where standing is concerned. And a class of individuals, named in an unconstitutional ordinance and intended by their local government to bear the primary burden of its regulation, will no longer have a cause of action under Section 1983 simply because they can be characterized as consumers. As the filing of several briefs by amici in support of the petition confirms, that view of the Commerce Clause is wrong in many important particulars that merit this Court's review.

I. THE DECISION BELOW RADICALLY CURTAILS THE LAW OF STANDING AND DENIES A REMEDY TO THOSE MOST AFFECTED BY THE COMMERCE CLAUSE VIOLATION

The court of appeals seized upon the fact that most of the Petitioners were "consumers" to create a new doctrine of standing that focuses on where the burden on commerce is erected, rather than on who is hurt thereby. Since the local government here interdicted the stream of commerce by restricting the movement of an intermediary, the waste haulers, the court of appeals concluded that the waste generators were not "directly" affected, and therefore they were neither in the "zone of interests" of the Commerce Clause nor did they have a viable claim under the "third party standing" doctrine.

A. Petitioners Assert Their Own Rights To Engage in Interstate Commerce, Rather Than Those of Third Parties

The court of appeals' analysis of third-party standing only becomes relevant if Petitioners have no Commerce Clause rights of their own to assert, and the court of appeals' decision that Petitioners do not is its principal and most important error. Petitioners sought relief from an ordinance primarily enacted to affect their own waste generation and disposal activity. The fact that others, in this instance waste haulers, were also affected does not relegate Petitioners to mere incidental status, as was the case in *Warth v. Seldin*, 422 U.S. 507 (1975), relied on so extensively by the court below.

In *Warth*, taxpayer residents of Rochester, New York alleged that discriminatory housing practices in neighboring Penfield forced Rochester to build more low-income housing than it otherwise would have, which allegedly caused higher taxes for Rochester residents. The Court noted that "[p]etitioners do not, even if they could, assert any personal right under the Constitution . . . to be free of action from a *neighboring municipality* that may have some *incidental adverse effect* on Rochester." 422 U.S. at 509 (emphasis supplied). They did not allege (and could not have alleged) that their own equal protection rights were harmed by neighboring Penfield. Any injury suffered by the *Warth* petitioners "result[ed] only from decisions made by the appropriate Rochester authorities, who are not parties to this case." *Id.*

Here, in sharp contrast, Petitioners allege that their own County directly, intentionally, and measurably interfered with Petitioners' own rights to participate in interstate commerce. "Third party" standing doctrine does not apply. Instead, Petitioners' standing is based on meeting the requirements of Article III (with which the court of appeals agreed) and asserting rights of their own which come within the zone of interests of the dormant Com-

merce Clause.[1] No further requirements need be met. *See Data Processing Service v. Camp*, 397 U.S. 150 (1970).

B. Respondent Cannot Square the Court of Appeals' View of the Zone of Interests of the Commerce Clause With This Court's Precedent

As Respondent correctly asserts, the court of appeals essentially holds that only those consumers who physically cross state lines or directly "purchase goods or do business across state borders" are engaged in interstate commerce; all others are conclusively presumed to be outside the zone of interests the Commerce Clause protects. App. 12a-13a. Under that view, transacting with a hauler who hauls waste out-of-state either is not part of interstate commerce at all, or is insufficiently important to create a right to relief for the demonstrably injured purchaser of waste disposal services. Opp. at 15; App. 12a.

Neither Respondent nor the opinion below, however, can explain away at least three Supreme Court cases—*Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); and *Boston Stock Exchange, et al. v. State Tax Commission, et al.*, 429 U.S. 318 (1977)—in which Commerce Clause claims were allowed where the plaintiff neither physically crossed state lines nor did first-hand business across state borders. Indeed, none of these cases were discussed or even cited by the court of appeals.

Respondent first attempts to distinguish these cases by suggesting that "standing was not challenged" or that

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[1] The assertion by Respondent and the court of appeals at App. 8a-9a, that Petitioners failed to allege an interest in interstate commerce is simply incorrect. Petitioners specifically alleged that they were harmed as a result of Ordinance 12's interference with Petitioners' access to the market, including those lower cost waste services that were available at out-of-state disposal facilities, Complaint ¶¶ 16, 24, 29, 31, and that they were asserting a claim for violation of their Commerce Clause rights. *Id.*, ¶¶ 53-65.

third-party standing was not discussed. Opp. at 15 n. 12. To the contrary, standing was vigorously contested, and *Warth* was cited in each of them.[2] The third party standing aspect of *Warth*, however, was not considered relevant because the doctrine simply did not apply. As in this case, each of the plaintiffs in those cases sought to vindicate its own rights, even though the interference with the stream of commerce technically took place at another point in the stream.

Respondent then offers an equally implausible alternative explanation, suggesting that in those cases "the plaintiff's connection with the regulated transaction went far beyond the indirect harm to personal consumer finances alleged by Petitioners," Opp. at 15 n. 12, and attempting thereby to justify the court of appeals' conclusion that consumers are somehow inherently excluded from the zone of interests of the Commerce Clause. Neither Respondent nor the court below, however, offer any authority for the proposition that economic injury in the form of "harm to personal consumer finances" merits any less protection than other economic harms, or that corporate economic injury is somehow more privileged than individual economic harm.[3] Moreover, Respondent conveniently ignores the fact that the Plaintiff class includes thousands of businesses who suffered millions of dollars of financial injury from illegally inflated tipping fees.

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[2] *Wyoming*, 502 U.S. at 446-454; *see also id.* at 465-466 (Scalia, J., dissenting); *Hunt*, 432 U.S. at 341-345; *Boston Stock Exchange*, 429 U.S. at 320-321 n. 3.

[3] An obliquely stated premise of the court of appeals' analysis is a concern over the extent to which all consumers, however remotely situated, might have rights under the Commerce Clause if standing is allowed here. Such concern is misplaced. Petitioners are not merely far-removed consumers. The waste Petitioners produce constitutes the very item of commerce the County sought to regulate by preventing it from crossing state lines.

C. The Court of Appeals' Decision Depends on an Artificial Isolation of the Participants in the Chain of Commerce

Respondent and the court of appeals attempt to avoid the obvious inconsistency of the result in this case with established precedent by creating artificial distinctions among participants in the chain of commerce. The court of appeals asserted that the generators' claims "turn on the right of the *haulers* to be free of the Ordinance's designation requirements," Opp. at 9; App. 13a (emphasis in original).[4] This attempted distinction ignores the interdependence of participants in the chain of commerce and the individual entitlement of each link in that chain to the protections of the Commerce Clause. No participant engages in interstate commerce in isolation. The camp plaintiff's claim in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 117 S.Ct. 1590 (1997), depended on the freedom of the campers to come to Maine for summer camp. The rights of the apple grower plaintiffs in *Hunt* depended on the ability of apple distributors to ship their produce to other states. The backhaul arranger plaintiff's claim in *Government Suppliers Consolidating Services v. Bayh,* 975 F.2d 1267 (7th Cir. 1992), *cert. denied,* 506 U.S. 1052 (1993), depended on the ability of haulers to haul waste across state lines. Each of those plaintiffs was critically dependent on the rights of others through whom they transacted business to be free from discriminatory actions; none of them crossed state lines themselves, yet all had standing.

The artificiality of tying Commerce Clause rights to the participant in the chain who passes between state borders is most tellingly illustrated by *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 504 U.S. 353 (1992), where the landfill plaintiff was

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[4] It should be noted, however, that Respondent previously argued it was the *haulers* who lacked standing because it was the *generators* who actually bore the economic burden of the County's action. *See* footnote 7, *infra.*

physically unable to cross state lines; the plaintiff there was just as dependent on haulers to bring it waste as Petitioners are here to remove their waste. Respondent completely fails to explain how a landfill "waiting for waste at the gate" is different from a generator "putting the can on the curb." *Cf.* Opp. at 15. Similarly, the plaintiffs in *General Motors Corp. v. Tracy*, 117 S.Ct. 811 (1997), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), did not physically carry goods across state lines, were completely dependent on intermediary shippers, and were simply interested in obtaining lower cost natural gas and liquor, respectively. The distinction between Petitioners and those plaintiffs is purely semantic.

D. A Requirement of "Direct Liability" Cannot Be Reconciled With This Court's Precedent Granting Standing to Unregulated Parties

The court of appeals attempted to distinguish *Tracy*, *Bacchus*, and *Camps* by noting that the plaintiffs there were "directly liable" under the challenged statutes. App. 12a. Requiring a showing of "direct liability" for Commerce Clause standing also contradicts this Court's precedent. In *Boston Stock Exchange* the Court explicitly noted that the plaintiff exchanges themselves suffered only "indirectly" as a result of the imposition *on others* of a discriminatory tax that violated the Commerce Clause, 429 U.S. at 320 n. 3, yet also explicitly found standing because they were in the "zone of interests" of that constitutional guarantee.[5] Nor can the court of appeals' decision be reconciled with *Hunt*, where Washington apple growers themselves, as well as the dealers they contracted

[5] "The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax *indirectly* infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.'" 429 U.S. at 320-321, n. 3 (citing *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970) (emphasis supplied)).

with to move the apples interstate, were held to have standing to challenge a discriminatory North Carolina law. These decisions make sense only as part of a Commerce Clause doctrine that recognizes the interconnectedness of the links in the chain of commerce. The court of appeals' contrary decision is antithetical to the Commerce Clause "vision of the Founders" and "the doctrine of this Court which has given it reality." *Dennis v. Higgins*, 498 U.S. 439, 449 (1991) (citation omitted).[6]

E. Petitioners Satisfy Even a "Direct Liability" Standard

While the cases discussed above illustrate that Petitioners need not meet any special test for "direct" liability, a continuing misconception advanced by Respondent demands response. There is no doubt that Petitioners are, and were from the beginning intended to be, the object of the County's discriminatory regulation. By Respondent's own earlier admission, the haulers were nothing more than a conduit through which the County could accomplish its ultimate goal: imposing higher tip fees on Petitioners in order to effectuate a change in the behavior of waste generators.[7] Respondent concedes that it anticipated and *wanted* to increase costs for Petitioners. *Id.*;

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[6] Respondent's invocation of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), is particularly disingenuous and inapposite here. Beyond the fact that Respondents argued the exact opposite before the district court (*see* footnote 7 *infra*), the indirect purchaser rule of *Illinois Brick* was explicitly derived from the unique statutory framework of the Sherman Act. *Id.* at 736. *California v. ARC America Corp.*, 490 U.S. 93, 102-103 (1988). It has never been applied by this Court outside of the antitrust context, let alone to remedies for constitutional violations.

[7] As noted by the trial court: "In arguing that the haulers lacked standing in *Oehrleins*, the County stated to this court that 'the full cost of solid waste management was made visible and obvious to, and borne by, the waste generators.'" App. 49a (citing Def.'s Mem. Opp. Summ. J. at 5).

Opp. at 5 n. 5.[8] Ordinance 12 was aimed squarely at the generators, and it was the generators who felt its pinch.[9]

F. The Court of Appeals' Decision Resurrects a Distinction Between the Reach of the Affirmative and Dormant Aspects of the Commerce Clause That This Court Has Rejected

Finally, as specifically applied to the commerce involved in this case, this Court has held both that solid waste is an article of interstate commerce, and that, with regard to solid waste, there is no difference between the reach of the affirmative Commerce Clause and the dormant Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 621-623 (1978); *see also Camps*, 117 S.Ct. at 1597. Respondent attempts to justify the court of appeals' decision by suggesting that generators can "wash their hands" of their waste merely by putting it out on the curb, Opp. at 15, and that they thereby somehow insulate themselves from the reach of the Commerce Clause. This narrow view of commerce cannot be squared

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[8] Respondent's current suggestion that the ultimate impact on the generators was somehow uncertain, *cf.* Opp. at 5, is a transparent after-the-fact effort to recast the impact of the Ordinance. Respondent expressed no such equivocations at the time the Ordinance was enacted. The County required generators to use County-licensed haulers, through whom the County completely controlled the flow of waste. Ordinance 12 at § III Subs. I (App. at 93a-94a). The County's Designation Plan counted on, and itself stated that, "tipping fees *would have to be passed on by haulers* to their customers," *see* App. at 10a n. 7 (emphasis supplied), and the County represented to the trial court that the "full cost" was in fact borne by the generators, not the haulers. *See* note 7, *supra*.

[9] In this sense, Ordinance 12 was an even more direct regulation on Petitioners than on the "directly liable" parties in *Tracy* and *Bacchus Imports*. In those cases, the State intended the burden of its regulation to fall elsewhere, and General Motors and Bacchus Imports could have avoided any tax liability at all by purchasing natural gas and liquor, respectively, in-state with minimal if any impact on themselves. Petitioners here were forced to participate in the County's system, and had no option of taking their waste anywhere else.

with cases upholding the regulatory reach of federal laws governing the generation, transportation, disposal, and cleanup of hazardous and solid wastes. *See* the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 et seq. (RCRA) (authorizing regulation of generators at §§ 6921-22), or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq. (CERCLA) (establishing generator liability at § 9607).[10] The court of appeals directly conflicts with *Camps*, 117 S.Ct. at 1597, when it finds that the very same generators who can be regulated under the affirmative Commerce Clause are unable to claim the protections of the dormant Commerce Clause.

II. THE COURT OF APPEALS' DECISION IMPROPERLY CONSTRAINS DISTRICT COURT CONSIDERATION OF DISCRIMINATORY PURPOSE AND EFFECT

The court of appeals' analysis of so-called "intrastate" designation (Ordinance 12 as enforced after 1993) also reflects a fundamental misconception of this Court's Commerce Clause jurisprudence. Even after "suspension" of full enforcement of Ordinance 12, access to the Hennepin County market was limited to those out-of-state interests who could compete with the preferred local facility while still keeping their own processing facility out-of-state. This sort of partial access does not automatically take the case out of the rule of *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). In forbidding the trial court from even considering whether this and other evi-

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[10] *See Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276-277 (1981); *United States v. Rogers*, 685 F.Supp. 201, 203 (D. Minn. 1987) (citing *Hodel* in holding that RCRA is a valid exercise of the Commerce power); *Wickland Oil Terminals v. ASARCO, Inc.*, 654 F. Supp. 955 (N.D. Cal. 1987) (citing *Hodel* in holding that CERCLA is a valid exercise of the Commerce power). Residential generators are exempted from CERCLA liability for policy reasons by statute, not out of any limitation under the Commerce Clause. *See* 42 U.S.C. § 9601(9)(B).

dence [11] could show discriminatory effect or intent, the court of appeals eliminated the application of strict scrutiny for Commerce Clause violations in all but the most blatant, facially discriminatory cases. The court of appeals' willingness simply to brush aside archetypal evidence of discrimination, and its de facto fashioning of a "good faith" exception to Commerce Clause liability, merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] Respondent's argument that allowing the district court to consider further evidence of discriminatory purpose and effect would "serve no purpose" because the court of appeals rejected all the evidence before it, Opp. at 25-27, is contradicted by the very cases it cites in support of that proposition. In *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), this Court rejected the proffered evidence of discriminatory purpose only when viewed "in context," *id.* at 463 n. 7, upon review of a complete record compiled after "extensive evidentiary hearings," *id.* at 461. Similarly, in *Maine v. Taylor*, 477 U.S. 131 (1985), the Court again had the benefit of a full record. *Id.* at 140. It is one thing for the court of appeals to conclude (erroneously in Petitioners' view) that a letter from the Deputy County Attorney provided 12 days before the County adopted the exact approach he proposed was insufficient evidence to demonstrate discriminatory purpose as a matter of law on summary judgment. It is quite another, however, for it to conclude that it is no evidence at all.